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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 624

JOHN R. HENDRICKSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of conviction of the United States District Court for the Southern District of California, Central Division, adjudging petitioner guilty on all counts of a 26 count indictment charging conspiracy to abstract and misapply in excess of $3,500,000 of the money, funds and credits of the Long Beach National Bank without paying consideration therefor, in violation of Title 18, United States Code, Sections 371 and 656, and twenty-five substantive offenses of aiding and abetting the

willful abstraction of money, funds and credits of that bank, in violation of Title 18, United States Code, Sections 2 and 656.

Opinion Below.

The opinion of the Court of Appeals is reported in 295 F. 2d 63. It appears in Appendix A to the Petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 14, 1961. (See Appendix B.) Thereafter on October 16, 1961, petitioner filed a petition for rehearing with the Court, the Court considered and denied the petition on October 26, 1961. On November 22, 1961, upon application of petitioner, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States made an order extending time for filing petition for writ of certiorari in this matter to and including December 23, 1961.

The jurisdiction of the Supreme Court of the United States is invoked under Section 1254(1) of Title 28, United States Code. See also Rules 37(b)(c) and 45(b), Federal Rules of Criminal Procedure. Jurisdiction in the Court of Appeals was based on Sections 1291 and 1294(1) of Title 28, United States Code. The District Court's jurisdiction was based on Title 28, United States Code, Section 3231.

Question Presented.

The record discloses that during the course of the eleven day trial of petitioner in the District Court below, somewhat more than 8400 questions were put to the witnesses, the questions and testimony comprising approximately 1,750 pages of the reporter's transcript of the trial. Approximately one-third of these questions were propounded by the trial judge to the witnesses including petitioner who testified in his own defense. These questions and testimony in response comprised over 500 pages of the transcript.

The record discloses that the trial court missed no opportunity to develop evidence to aid the prosecution and break down the testimony that might be favorable to the defense. This was accomplished by continuous and persistent interruptions by the Court of examinations of the witnesses, both direct and cross, conducted by both counsel, for the purpose of cross-examining the witness. The nature and character of the Court's participation in the trial not only disrupted the orderly process of trial and interfered with counsels' presentation of their respective cases, but necessarily created the impression in the minds of the jurors that the Court, as well as the prosecution, was attempting to obtain petitioner's conviction.

The question presented here, therefore, is whether the nature and extent of trial court's participation in the examination and cross-examination of the witnesses, including petitioner, upon trial, substantially prejudiced petitioner and deprived him of the fair and impartial trial guaranteed by the Fifth and Sixth Amendments.

Constitutional Provisions Involved.

U. S. C. Constitution, Amendment V.

"AMENDMENT V-CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. C. Constitution, Amendment VI.

"AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statement of Case and Facts.

I.

On November 25, 1959, a twenty-six count indictment was returned charging violations of Title 18, United States Code, Sections 2, 371 and 656. Count One charging that petitioner conspired with George A. Hewlett to abstract and misapply moneys, funds and credits of the Long Beach National Bank, the object being to supply petitioner with moneys of said bank in excess of $3,500,000, without petitioner paying consideration therefore. Counts Two to Twenty-Six charged substantive offenses of willful abstraction and misapplication by George A. Hewlett of funds in excess of $660,000 and that petitioner knowingly and willfully aided, abetted, counseled and induced and procured the commission of these criminal acts of George A. Hewlett which covered a period from December 1954 through April 1959. [C. T. 2-36.][1]

Petitioner entered pleas of not guilty to all counts and on March 1, 1960, a jury trial commenced before the Honorable Alexander Bicks, United States District Judge. [C. T. 110.]

On March 18, 1960, the jury returned a verdict of guilty on each count. [C. T. 141-144.] On April 11, 1960, petitioner was adjudged guilty and sentenced to serve twenty-five years in the custody of the Attorney General. [C. T. 145-147.] Notice of Appeal was timely filed. [C. T. 148-149.]

The jurisdiction of the District Court was based on Title 18, United States Code, Section 3231.

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[1]C. T. followed by numbers within brackets signifies the pages of the typewritten transcript of the record filed by the Clerk of the United States District Court. R. T. signifies the reporter's transcript of the proceedings at the trial.

II.

In April, 1959, the United States National Bank of San Diego acquired the Long Beach National Bank and shortly thereafter an audit disclosed a shortage of funds in the Long Beach National Bank in the approximate sum of 3.7 million dollars. [R. T. 81-83.]

On May 1, 1959, George A. Hewlett, the cashier of the Long Beach National Bank, took his own life. [R. T. 1444-1445.] It was stipulated by the parties [C. T. 80] that certain cashier's checks of the Long Beach National Bank, insufficient fund checks of petitioner John R. Hendrickson and other documents belonging to the Long Beach National Bank were found at the residence of George A. Hewlett, shortly after his death.

It was further stipulated by the parties [C. T. 44] that George A. Hewlett issued cashier's checks of the Long Beach National Bank without the bank receiving any consideration therefore and that to conceal the shortage of the bank funds, made false debit entries in the bank's records showing moneys in a correspondent bank in excess of the actual amounts therein. [R. T. 1057-1063.] This activity apparently commenced in April, 1954, and concluded some time in April of 1959.

The evidence clearly establishes and it was conceded that Hewlett misapplied and abstracted funds of the Long Beach National Bank.

The payees of the various cashier's checks, for which the bank received no consideration, were as follows: Adelanto Corporation, Barnes Heating and Equipment Company, Barnes Heating Sales and Service, Inc., Barnes Heating & Ventilating Company, John's Heating Sales and Service Company, Regal Heating Corp.,

L. H. Scott Company, Inc., Tamco Corporation, Sonoma County Abstract Co., L. H. Scott, Robert W. Evans, petitioner, and miscellaneous other payees. [R. T. 1027-1028.] It was conceded that petitioner was the ultimate recipient of the moneys misapplied by Hewlett, for on July 24, 1959, through their attorneys, James E. Burns, Kennedy, Bloom & Fletcher, by James M. Fletcher and Phillip A. Kennedy, in an action in the Superior Court of the State of California, County of Los Angeles, entitled United States National Bank of San Diego v. John R. Hendrickson, et al., petitioner, individually and Tamco Corp., Barnes Heating & Equipment Company and Regal Heater Co., by John R. Hendrickson, President; Phillip A. Kennedy, Secretary; some of the defendants therein, stipulated to entry of judgment against them in the sum of $3,714,710.96. [R. T. 97.]

The question presented to the jury at the conclusion of trial was that of the petitioner's knowledge of Hewlett's criminal conduct [R. T. 2103, 2120], it being stipulated by the parties that if the jury found there was a conspiracy as alleged in the indictment and that petitioner was a member of that conspiracy, then the jury might find that the overt acts charged were committed. [R. T. 2191.]

Summarizing the evidence, testimony of government witness indicated that petitioner, during the period 1954-1959, made certain statements concerning his source of funds; one witness testified that petitioner introduced Hewlett as an associate or partner in 1953 or 1954 [R. T. 119], and that an oil company had bought out various business ventures of petitioner. [R. T. 124.]

Another testified that petitioner said he was associated with an investment group in San Rafael, California, doing construction and oil development, the group being headed by Phillip A. Kennedy. [R. T. 151-152.] Another witness testified that petitioner told him that moneys invested in Adelanto Development Corp. were obtained from relatives and friends [R. T. 242], and another witness testified that petitioner stated that he and Phillip Kennedy were in the oil business and other ventures and that Kennedy was providing the money for these ventures. [R. T. 634-635.] Still another witness testified that petitioner called him on the phone in 1955 informing him that he had just completed a three million dollar deal with Standard Oil Company, and there was other such testimony.

Petitioner took the stand and testified. He denied that he conspired with or aided, abetted or induced Hewlett to misapply funds. [R. T. 1589.] He testified that in October, 1954, Hewlett agreed to invest $20,000.00 in Adelanto Development Corp. [R. T. 1501], which petitioner had, with several others, formed for the purpose of oil exploration. He stated that Hewlett told him that these were moneys he had in a savings account. [R. T. 1504.] Petitioner stated that he had no knowledge that Hewlett made false entries in the records of the Long Beach National Bank to cover insufficient fund checks of his [R. T. 1468, 1499, 1780-1981] or knew, or could explain why Hewlett had certain checks which were found at Hewlett's home after his death. [R. T. 1468.] Additional investments were later made in Adelanto, by Hewlett, after petitioner advised him that more funds were required for Adelanto and he indicated that he had obtained moneys

from other persons for that purpose. These additional funds were received in the form of cashier's checks to petitioner or persons or organizations supplying Adelanto. [R. T. 1540-1543.] Hewlett's original investment was represented by an assignment to him of an interest in Adelanto [R. T. 77] and that some of the subsequent investments by other investors through Hewlett, or so he told petitioner, were represented by other assignments, copies of which petitioner could not locate or produce. [R. T. 1545.] Petitioner never met any of the investors Hewlett told him were investing funds through him. [R. T. 1545.] However, petitioner received various other moneys during 1955-1959 from the investors Hewlett told petitioner were investing through him, for investment in various ventures. These moneys were borrowed or otherwise obtained from the so called investors, there being agreements and notes evidencing these transactions which petitioner could not locate. [R. T. 1703-1711.] At the commencement of the second day of petitioner's examination, he stated that due to confusion suffered by him during the prior session, he had answered certain questions incorrectly and wanted to correct his testimony. [R. T. 1697.] He stated that his personal financial statement of July 1958, showing his net worth at approximately two million dollars was not correct [R. T. 1698], and that this statement actually reflected investments of the investors' money in his various companies. [R. T. 1699.] He also admitted that a personal financial statement submitted to a bank in 1957 showing a substantial personal net worth was also false. [R. T. 1711-1712.] Further, he admitted kiting checks in 1954 during which period he had issued numerous insufficient fund checks

[R. T. 1462, 1822] and that he had engaged in the same conduct to purchase cashier's checks from the Long Beach National Bank at a later period, though he denied that he had discussed this or had an arrangement concerning this with Hewlett. [R. T. 1938.]

In order to clarify the question presented herein, it is necessary to set forth in the petition a few examples of the nature and extent of the trial court's participation in the examination of some of the witnesses. Space does not permit the inclusion of each and every instance of the trial court's participation.

Examination of Phillip Kennedy.

This witness is an attorney; he was the 50-50 partner with petitioner, and an officer, in various business ventures and companies, including those organizations which were defendants, with petitioner, in the action by the Long Beach National Bank and, against whom judgment was stipulated [R. T. 97]; he was a member of the law firm Kennedy, Bloom, and Fletcher, which represented petitioner and himself in their various business ventures; which firm, with Mr. James E. Burns, represented petitioner and the other corporate defendants in the above mentioned action; and whose law partner, James M. Fletcher was petitioner's co-counsel with Mr. Burns. It is to be noted that the witness' connection not only with the petitioner, but counsel for the defense as well, was extremely close and intimate. The trial Court continued the already established pattern of interrupting and disrupting the examination of witnesses, interrupting the Government's examination of Mr. Kennedy approximately *30* times, directing some *222* questions of a total *569* questions to

the witness which comprised some *40* pages of approximately *117* pages of the transcript of the testimony of the witness.

Shortly after the direct examination was under way, the Court commenced its interruptions of counsel's examination. There were several, varying in length from a few brief questions to almost *3* pages of the transcript. [R. T. 427-429.]

While the witness was being examined concerning his knowledge of an assignment of an interest in Basin Uranium, a company in which petitioner owned an interest through this witness, to Mr. George Hewlett, the Court interrupted the examination [R. T. 442] to cross-examine the witness for almost 7 pages of the transcript. [R. T. 442-449.] The following is a portion of this examination [R. T. 442-444]:

> "The Court: Weren't you interested in a fellow who was going to be a co-entrepreneur of yours?
>
> The Witness: No, I wasn't your Honor. I believe Mr. Hendrickson at that time had more or less taken over the active management of Basin Uranium.
>
> The Court: Without regard to who had taken over active management of Basin Uranium, it was a private company, was it not?
>
> The Witness: That is correct.
>
> The Court: With a small number of stockholders and here somebody was going to come in. Didn't you inquire as to who this fellow was?
>
> The Witness: I did not, your Honor.
>
> The Court: As a lawyer, aren't you careful about who your associates are?
>
> The Witness: I try to be.

The Court: Did you make any inquiry here? What did you do to be careful here?

The Witness: I didn't investigate him at all.

The Court: Did you ask Mr. Hendrickson who he was?

The Witness: I can't recall that I ever did, your Honor. It was sufficient for me that he wanted Mr. Hewlett to have an interest, a leasehold interest in Oklahoma.

The Court: And you proceeded then on the basis of asking no questions?

The Witness: No, your Honor. If I may amplify my answer?"

And another portion of this examination is here reproduced [R. T. 446]:

"The Court: How old are you, Mr. Kennedy?

The Witness: 49.

The Court: Ever suffer from amnesia?

The Witness: No, not as far as I know.

The Court: These transactions don't go back too far, do they?

The Witness: Well, they do, your Honor. They go back over a period of time.

The Court: A period of time commencing when?

The Witness: Well, approximately late '54 or early '55."

Thereafter the Court commenced another cross-examination of the witness for *4* pages of the transcript [R. T. 452-457] concerning the minutes of Basin Uranium relating to the assignment to Hewlett of an in-

terest therein, during which the following occurred [R. T. 452-457]:

"The Court: It was not a gift?

The Witness: No, it was not.

The Court: But the minute book does not reflect why an interest in a piece of property of the corporation was going to be conveyed to a complete stranger.

The Witness: It does not.

The Court: And you think that is a sound way of doing business?

The Witness: Well, your Honor, if the other—

The Court: Is that the way you run your practice?

The Witness: Your Honor, I try to run my practice as best I know how.

The Court: Is that the best you know how?

The Witness: I don't exactly know how to answer your question.

The Court: You said you tried to run it the best you know how. I asked you, is that the best you know how, and you don't know how to answer. When a corporation authorizes its officers to do an act, doesn't it say upon resolution duly made, seconded and carried, so-and-so dissenting, if somebody dissents, it was resolved that the proper officers of this corporation be and they hereby are authorized to do one, two, three, four, against receipt of payment in the amount of so-and-so, this, that, this—isn't that so?

The Witness: Not necessarily so, your Honor. I have seen corporation minutes where resolutions are given—

The Court: Just blanket authority?
The Witness: That's right.
The Court: I see. All right."

Thereafter during an examination concerning the witness' knowledge of the source of petitioner's funds the court interrupted the examination once again, during which the following occurred [R. T. 464-465]:

"The Court: You were borrowing relatively smaller sums in relation to the sums he was borrowing.

The Witness: That is true.

The Court: Your relationship was a very close one?

The Witness: We were good friends.

The Court: You loved one another, I believe that is the word you used?

The Witness: I certainly had a deep affection for him.

The Court: You had a deep affection for him. Wouldn't your deep affection for him impel you to make inquiry, to say, 'Now, John, I don't want to go into your private business, but we are old pals and you know how I feel towards you. Can you just give me in secret where you are getting all this money from, who is putting it up?

The Witness: I did ask him.' "

Then while the witness was being examined by Mr. Bevan concerning moneys he was advancing to Tamco Corporation, the Court interrupted still another time to cross-examine the witness for approximately 4 pages of the transcript during which the following occurred [R. T. 478-479]:

"The Court: Did you inquire where he was getting that money?

The Witness: Yes, sir.

The Court: And what did he tell you?

The Witness: He said he borrowed it.

The Court: Did you ask him upon what security he was borrowing those other rather substantial sums?

The Witness: No, I didn't, sir.

The Court: Well, as far as you know was he borrowing it upon an unsecured basis?

The Witness: I do not know the basis on which he was borrowing it, secured or unsecured.

The Court: But you were his closest friend, weren't you?

The Court: And you were interested in it more than as a client, there was an affectionate relationship between you?

The Witness: That is right.

The Court: Didn't you advise him at that time—"

Examination of Robert Evans.

The witness, an attorney, was engaged in a continuous lending transaction with petitioner, involving cashier's checks of the Long Beach National Bank, for a period of approximately 4 years ending in 1959. He was called by the government to testify about the details of these transactions. Here again, the Court asked approximately *89* questions of a total of *379* during his entire examination, interrupting the government's examination on some *16* occasions.

Shortly after direct examination commenced the Court took it over for some *2* pages of the transcript

[R. T. 752-755] on some matters irrelevant to the purpose of the government's examination and thereafter several more interruptions to examine the witness occurred, varying from a few questions to almost 2 pages of the transcript.

During cross-examination the witness expressed a belief [R. T. 817] that certain checks purportedly issued by petitioner to the witness, on which the witness' endorsement was forged, were not in fact signed by the petitioner. These checks had been found at Hewlett's residence. Thereafter, during redirect while Mr. Bevan was examining the witness about the writing and signatures appearing on these checks, the Court suddenly took over the examination to *cross-examine* the witness about this matter, as follows [R. T. 822 826]:

> "The Court: Now, Mr. Witness, would you please look at Government's Exhibit 879, in evidence, and tell us whether that bears Mr. Hendrickson's signature.
>
> The Witness: Yes, Your Honor. That bears Mr. Hendrickson's signature.
>
> The Court: Look at Government's Exhibit 826, would you. Does that bear the defendant Hendrickson's signature?
>
> The Witness: Yes, Your Honor, I believe it does.
>
> The Court: Government's Exhibit 645, does that bear Mr. Hendrickson's signature?
>
> The Witness: Your Honor, I do not know.
>
> The Court: Would you like to compare it with the signatures that appear on the two documents that you say you do know?
>
> The Witness: (Examining exhibits). The signatures your Honor, look very much alike.

The Court: It was the "H" that was bothering you?

The Witness: It was the "H" that was bothering me.

The Court: Are the Hs alike?

The Witness: The Hs are quite similar, your Honor.

The Court: Now look at 641, is that the defendant's signature?

The Witness: Your Honor, I do not know.

The Court: The Hs look alike?

The Witness: Yes, I would say there is a great similarity.

The Court: Wasn't that the reason why you said you didn't know?

The Witness: That is right, your Honor.

The Court: Now you find that there is a similiarity, do you think that it is the same handwriting?

The Witness: Your Honor, I do not know. They are certainly very similar.

The Court: They are very similar?

The Witness: Yes, Your Honor.

The Court: Now look at Government's Exhibit 630.

The Witness: Yes, I have done that, your Honor.

The Court: Does it look like the same hand writing?

The Witness: They look very similar.

The Court: Now look through every one of these other exhibits where you had doubts before and compare with the others.

The Witness: (Examining Exhibits.) The signatures all look very similar to me, your Honor.

The Court: And when you thought you saw a difference because of the H you find that there is no difference now any more, is there?

The Witness: I find that the difference either is not there or less pronounced than I thought it would be.

The Court: Than you thought it could be when?

The Witness: Before I examined the first two documents exhibited to me by Mr. Bevan.

The Court: You didn't testify without thinking, did you, Mr. Evans?

The Witness: Your Honor, I thought that I was more familiar with Mr. Hendrickson's signature than I apparently was. The Hs on the two checks did not look to me like I remembered Mr. Hendrickson's Hs to be.

The Court: Well, if you were in doubt didn't you think you should have said, now let me look and see?

The Witness: I wish I would have done that, your Honor.

The Court: Now when these papers were first shown to you in May, or whenever it was, of 1959, did you express any doubt at all about the signature?

The Witness: I don't believe that I did.

The Court: Did you then sign a statement dealing with that subject?

The Witness: I don't believe that I did, your Honor.

The Court: Does the statement deal with that?

Mr. Bevan: No, your Honor, it was dated previously and as Mr. Evans stated—

The Court: You identified it and you had no doubt about it then?

The Witness: I believe my statement to the Government agents was that the signatures looked to me like the signatures of Mr. Hendrickson.

The Court: Now what is it that has transpired since that time and now that you have been on this witness stand that has created any doubt in your mind?

The Witness: The only thing that created doubt in my mind, your Honor; was that when these first two checks were handed to me and looking at them I did not think the H in Mr. Hendrickson's name looked as I remembered his Hs to be.

The Court: You now want to correct your testimony?

The Witness: I do, your Honor.

The Court: All right. In what respect?

The Witness: In my opinion now all of these signatures are either identical or very similar one to another.

The Court: And are they signatures of the defendant Hendrickson?

The Witness: In my opinion, your Honor, they are.

The Court: You may proceed counsel."

Immediately thereafter, for over 2 pages of the transcript [R. T. 827-829] the Court interrupted counsel on redirect once again to cross-examine the witness upon the very subject counsel was then examining the witness, to be followed almost at once by another one page cross-examination as follows [R. T. 830-831]:

"The Court: Did he ask you to come down to see him so you could explain to him how he had written the name of R. W. Evans as payee on some of these checks?

The Witness: No, your Honor.

The Court: What did he bring you down there for?

First of all, did he tell you what he brought you down there for?

The Witness: Yes, he did.

The Court: What did he say?

The Witness: Mr. Hendrickson stated that he wished me to bear with him under the circumstances, that he was sorry for the embarrassment that the over-all situation had caused to myself and to others. In the course of that conversation he mentioned that his attorney had discovered certain checks some of which supposedly bore my endorsement, which they knew to be forgeries and which they were going to turn over to the Government.

The Court: What embarrassment were you caused?

The Witness: What embarrassment I was caused was the fact that I was examined by the FBI, that there appeared to be a good chance that there would be much publicity arising out of his case, things of that nature.

The Court: Any embarrassment about having you testify?

The Witness: No.

The Court: Any embarrassment about your having not remembered some of these things?

The Witness: No, your Honor."

Examination of Raymond Morehouse.

This witness was a friend of petitioner and had transacted business with petitioner or one of his companies during the period 1954-1959. During his examination, on direct and cross, consisting of *74* pages of the transcript, approximately *397* questions were directed to this witness, of which the Court's some *162* questions, comprised approximately *28* pages of the transcript.

Shortly after the commencement of direct examination concerning checks the witness received from petitioner for goods sold to petitioner, and also representing loans to the witness, the Court took over the examination, this being one of the *dozen* interruptions of direct, to *cross-examine* the witness for over *8* pages of the transcript [R. T. 883-892] during which the following occurred [R. T. 886-887]:

"The Court: Didn't you have a line of credit at your bank?

The Witness: I had a line of credit at the bank up to $10,000.

The Court: And how much did you borrow from Mr. Hendrickson?

The Witness: $28,600, my records reflect.

The Court: Was Mr. Hendrickson in the banking business?

The Witness: I can't answer that, sir.

The Court: Did you think he was in the banking business?

The Witness: I never give it too much thought.

The Court: What prompted you to pick him out to borrow money from?

The Witness: It was offered to me.

The Court: Tell us what he said to you when he made you the offer.

The Witness: He said, if you get in trouble and need some money, I can help you out.

The Court: Just without any preface or just meeting you on the street, he says, listen, Ray, if you ever get in trouble and need some money come around and I can help you out?

The Witness: Well, during this time why—

The Court: What time is this?"

The next day, immediately after Mr. Bevan commenced direct again, the Court interrupted a question by him to examine the witness [R. T. 901], only to interrupt the examination once again, before the witness answered a question put to him by Mr. Bevan, to cross-examine the witness for 5 pages of the transcript [R. T. 903-910], during which, the following occurred [R. T. 908]:

"The Court : Now, Mr. Bevan asked you, did a time come when you discussed with Mr. Hendrickson his apparent change in financial condition so that now instead of giving you checks that bounced he was able to make a substantial loan?

Mr. Burns: Pardon me, your Honor. I think the last question of Mr. Bevan's concerned Mr. Hendrickson's interest, if any, in oil, any discussion concerning that, I believe the witness when asked the question that your Honor has just related, testified about offshore minerals."

And later following another interruption, the following occurred [R. T. 926-928]:

"The Court: Motion granted, Mr. Reporter, would you please read the question.

(The question referred to was read by the reporter as follows:

'Q. Do you recall anything further, any further conversation you had with him after his arrest?')

The Witness: At this time I don't recall any further conversation.

By Mr. Bevan:

Q. All right, sir. Your memory is pretty blank upon the subject, is that right? A. It is very vague.

The Court: Then you have exhausted your recollection?

The Witness: I met with Mr. Hendrickson—

The Court: Do you say that after further consideration you do recall now that you had another talk?

The Witness: Oh, your Honor, we probably saw each other 10 or 15 times, but to give you the conversation that took place—

The Court: That wasn't the question that Mr. Bevan put to you. The question Mr. Bevan put to you was, did you have any other conversations, and you said you didn't recall.

Mr. Burns: Pardon me, if your Honor please. The witness first stated that he had three or four talks—

The Court: The record speaks for itself, Mr. Burns.

Mr. Burns: That is what I am trying to say—

The Court: And the court—please be seated. The record speaks for itself and you may take an exception to any question that court put.

Mr. Burns: May the record show that I do take an exception, and likewise to the demand of your Honor to make me be seated.

The Court: Because you are not rising to make an objection. That is the only function of Counsel. You are not rising to make an objection.

Mr. Burns: If your Honor would give me an opportunity I would have tried to make a proper objection.

The Court: All right. You make your objection first and then if the Court wants to hear comment the court will ask for comment. The court does not first take a speech and then get an objection.

Now do you have an objection?

Mr. Burns: I have an objection.

The Court: Let's hear the objection. State your objection.

Mr. Burns: The objection is that this witness testified that he had—

The Court: Objection overruled. That is not an objection.

You may proceed, counsel."

The effect of the court's participation is illustrated by the following occurrence [R. T. 930-931]:

"Q. What was it, Mr. Morehouse, that made you forget within this less than 24-hour period what was said in that conversation? A. The reason that this is hard to remember what the particular conversation was is the fact that there were so many conversations.

The Court: Motion granted. Strike it out as not responsive.

Mr. Reporter, would you please read the question and please make answer to the question that is put to you, Mr. Witness.

The Witness: All right.

(The question referred to was read by the reporter. . . .)

The Witness: The reason that made me forget was the numerous questions that had been fired at me and it is a little bit confusing. I recall this conversation after I see it on paper. It didn't mean much to me at the time. I recalled Mr. Hendrickson making that statement."

Immediately thereafter Mr. Bevan stated that the defense could cross-examine, but the Court, commenced its own examination as follows [R. T. 932]:

"The Court: I don't believe I got the answer to the question.

Would you tell us what it was that he stated?

The Witness: Yesterday, sir?

The Court: No, not yesterday. Tell us what it was that he stated. I have written down in my notes—and if it is not correct I don't want it—'Hendrickson stated that he had borrowed the money from the Long Beach Bank.'

The Witness: Not the money, he had borrowed money.

The Court: That he had borrowed money."

Examination of J. Clayton Taylor.

This witness was one of the FBI agents who conducted the investigation of the books and records of the Long Beach National Bank concerning the shortage of funds therein. The witness was examined, on two separate occasions, occupying over 2 days of the trial, concerning the manner in which the shortage of funds occurred, details of Hewlett's falsification of the

bank records and the ultimate disposition of the funds creating the shortage.

During the witness' testimony of approximately *363* pages of the transcript, some *1857* questions were put to him. The Court asked *512* of them this testimony comprising *74* pages of the transcript. The extent and frequency of the Court's participation is illustrated by the over *130* interruptions during direct and cross. Numerous times during cross, immediately after Mr. Burns directed a question to the witness, the Court, before the witness answered, asked another question, and on more than one occasion the Court participated in the examination for the clear purpose of aiding the prosecution and to break down testimony favorable to appellant.

(A) Witness Taylor's first examination. The witness was permitted to testify as a defense witness for a particular limited purpose to clarify certain matters, raised by the testimony of another FBI agent, of which only this witness could testify. During Mr. Burn's brief direct examination the Court interrupted several times. Thereafter during redirect the witness testified that to *his* knowledge Hewlett was the person who made the false entries in the books of the Long Beach National Bank, that he concealed the shortage of funds from the bank officials, bank examiners, and from his own wife. The witness further testified that he did not know for a fact *that anyone else knew of the shortage of funds in the bank* [R. T. 1000], this reply being favorable to the defense on the sole issue ultimately presented to the jury, *i.e.*, petitioner's knowledge of Hewlett's criminal conduct. Immediately thereafter, the Court cross-examined the witness about this testimony [R. 1000-1001]:

"The Court: Didn't you testify that your examination of the books and records of the bank disclosed that an aggregate of $3,563,226.40 was the net amount paid out by Mr. Hewlett to or for the benefit or account of Mr. Hendrickson?

The Witness: Yes, your Honor.

The Court: Now in the light of that answer do you want to reconsider the answer to the last question?

The Witness: I can assume that Mr. Hendrickson knew it.

Mr. Burns: I am going to move the witness' assumption be stricken, your Honor. That is an issue for the jury.

The Court: That is right.

The Witness: Mr. Hendrickson knew that he had that much money, your Honor, which he had not given consideration to Long Beach National Bank therefor.

The Court: Now all these other checks that we have heard testimony about, in the language of the street that was just rigging the books with a view to concealing what Hewlett was doing?

The Witness: Yes, sir.

The Court: And he did a pretty successful job of it too, for a time?

The Witness: Yes, sir.

The Court: Any thing else?

Mr. Bevan: No questions."

It should be noted that the Court failed to make a proper ruling upon Mr. Burns' motion to strike, nor did the Court strike the testimony of the witness which he apparently volunteered where no question was pending, although frequently throughout the trial, *no motion*

or objection being made by either party, the Court struck testimony or sustained an "objection" on its own initiative.

Examination of Petitioner John R. Hendrickson.

Petitioner took the stand in his own defense and testified for approximately *3½* days. Direct examination was over ~~one~~ half day in length, consisting of *126* pages of transcript during which some *627* questions put to the witness, of which the court asked about *300 or almost 50%* of the total; this testimony comprising *59* pages of the transcript. The court interrupted counsel on direct over *45* times, this conduct disrupting any orderly presentation of petitioner's case and his direct examination. The interruptions by the court invariably were for the purpose of cross-examining petitioner which was accomplished by the court taking over the examination from his counsel. On cross-examination of petitioner, occupying almost three days of the trial, the Court joined with the prosecution in the *cross-examination* of petitioner. Cross-examination consisted of *469* pages of the transcript and approximately *1786* questions, *547* of which were asked by the Court, comprising *128* pages of the transcript. The Court interrupted the cross-examination with its own question over *140* times. The Court's conduct, in addition to effectively depriving petitioner the proper presentation of his case, caused the confusion of counsel and petitioner, as the record discloses.

A. Direct examination. Several interruptions occurred while petitioner was being examined concerning a check issued to him by his father which was returned showing "No Account" in the bank [R. T. 1471]. the

last of which commenced with an interruption of counsel in the middle of a question, as follows [R. T. 1475]:

"Q. Now, Mr. Hendrickson,—

The Court: The bank was in error when they returned it, saying 'No account'?

The Witness: Yes, your Honor.

The Court: Your father, did he do anything about that?

The Witness: Not that I recall at that time.

The Court: Wouldn't you think it was a reflection upon you if you drew a check upon your bank, where you had an account, and the bank returned that check 'No account'?

The Witness: I would.

The Court: Would you do something about it if you could?

The Witness: I certainly would.

The Court: Did your father do anything about it as far as you know?

The Witness: Not to my recollection."

Shortly thereafter the Court took over the examination of petitioner for approximately 7 pages of the transcript [R. T. 1480-1489] shifting away from counsel's line of questioning to a new subject and *cross-examining* the petitioner. Mr. Burns attempted once or twice during the court's examination to resume his examination, without success. And almost at once after counsel had regained the examination, the Court took it over before the witness had opportunity to answer a question put to him by counsel. [R. T. 1490-1491.]

And immediately after this the Court took over the examination again for approximately 7 pages of the transcript [R. T. 1492-1501] to *cross-examine* petition-

er. Mr. Burns managed to interject 2 questions while the Court's examination skipped from one subject to another, interrupting answers of petitioner over a *half-dozen* times. Shortly thereafter, following several more brief interruptions by the Court, the Court interrupted again as follows [R. T. 1511]:

"The Court: Didn't ownership of stock carry that with it?

Mr. Burns: Your Honor,—

The Witness: At that time there was a permit to issue stock, but the stock had not been issued.

The Court: I withdraw the question. I just don't follow this. I hope you will make it clear, Mr. Burns.

Mr. Burns: I will attempt to.

The Court: I am sure you will."

And immediately thereafter the following occurred [R. T. 1512-1513]:

"The Court: It is not responsive to the questions. Would you answer Mr. Burns' question?

The Witness: Would you read the question?

Mr. Burns: Maybe I can reframe it in the same form.

Mr. Bevan: I would be happy to have it read.

Mr. Burns: All right.

The Court: Mr. Burns thinks he can clarify it and make it easier for the witness.

Mr. Bevan: All right.

The Court: We want to make it as fair for the witness as possible.

Mr. Bevan: Very well.

The Court: Suppose you put the question to the witness again, if you think that is the thing to do."

And then several questions later the Court interrupting Mr. Burns launched into a comprehensive *cross-examination* of the witness for about 9 complete pages of the transcript [R. T. 1514-1524], commencing as follows:

"Q. Did it occur to you—

The Court: Was this something voluntary on your part?

The Witness: Yes, it was.

Q. By Mr. Burns: Mr. Hendrickson,—

The Court: This was on what day? When did you come to that conclusion?"

Then following 2 more interruptions by the Court [R. T. 1524, 1525], the Court took over petitioner's examination for some 2½ pages of the transcript [R. T. 1531-1534], during which the following occurred [R. T. 1533]:

"The Court: So that when you told us that you remember that this must have been paid for by you because all your other checks that you bought from that bank at that time to the order of Adelanto were paid for by you, you were mistaken or maybe I was mistaken in understanding your testimony?

The Witness: Well perhaps I don't understand you either, your Honor.

The Court: All right. Mr. Reporter, would you read the question. We want to make sure

that we all understand one another because all we want is the truth.

(The question referred to was read by the reporter. . . .)."

Then after three more interruptions by the Court [R. T. 1535, 1537, 1539], the Court took over again to cross-examine petitioner for almost 6 complete pages of the transcript. [R. T. 1544-1549.] After a series of more interruptions by the Court [R. T. 1549, 1550, 1553, 1556, 1558, 1562], the Court once again, interrupting the questioning of counsel resumed the examination [R. T. 1564-1565] which finally prompted counsel to remark as follows [R. T. 1565]:

"Mr. Burns: Your Honor, I don't like to interrupt your interrogation—

The Court: Go ahead.

Mr. Burns: —but I must confess to some mental deficiency, because I would like to develop this in an orderly fashion.

The Court: Please do, Mr. Burns."

But, after 2 questions, the Court interrupted again as follows [R. T. 1566]:

"The Court: Do I understand that it had been approved first and then he asked you your ability to repay?

The Witness: No, that was discussed previously, your Honor.

The Court: What didn't you tell us—would you read back this witness' statement, Mr. Reporter? . . ."

And in the following 2 pages of the transcript 2 more interruptions occurred [R. T. 1567, 1568] after which the following occurred [R. T. 1569-1571]:

"The Court: We understand, Mr. Hendrickson, that you are testifying under most difficult condition, anybody would be under the same emotional state that you are, but try to keep your voice up, because, remember, it is these 12 good people that are going to have to pass upon the facts in this case. So keep your voice up.

The Witness: Yes, Your Honor.

By Mr. Burns:

Q. Mr. Hendrickson, you don't have any emotional difficulties because you are afraid to let us know what all the facts are?

Mr. Bevan: Objected to as leading.

The Court: Objection overruled.

Members of the jury, if you got any such impression from the comment that this court just made, dismiss it from your minds. The Court has no views on that at all. The Court was just trying out of kindness to a witness to make the suggestion that a defendant on the stand sometimes is emotionally upset without regard to his guilt or innocence, and the Court had no idea and no purpose at all to suggest anything to you on that subject, because in the ultimate analysis you, and you alone, are going to pass upon all the facts in this case and determine the guilt or innocence, and nothing that this Court says is to be considered by you except on the question of law. And so that you can understand that this Court did not mean to imply what Mr. Burns' question might be construed to mean.

Mr. Burns: Your Honor, I didn't mean to construe anything from your remark, but I want to, if I can, be as effective an assistance as counsel for the defense as possible.

If Mr. Hendrickson is under some emotional strain I was not aware of the fact."

And counsel asked only 2 more questions before another interruption by the Court and exchange between Court and counsel occurred, as follows [R. T. 1571-1574]:

"The Court: Was your account charged with a hundred thousand dollars?

The Witness: I signed a note.

The Court: Was your account charged with a hundred thousand dollars?

The Witness: At that time, your Honor, I did not have—

The Court: Mr. Witness, you got bank statements periodically, monthly, from the bank, did you?

The Witness: What I am trying to say, your Honor, is at that particular time I did not have an account at the Long Beach National Bank. It was very inactive, I should say.

The Court: But you got bank statements of this inactive account?

The Witness: I believe I do have, yes.

The Court: Did any of those bank statements reflect a loan of a hundred thousand dollars?

The Witness: They did not. At the time the loan was made there was an additional slip that I signed for authorization to make the check directly payable to the Sonoma County Abstract Bureau.

The Court: Was the loan made to Sonoma County or to Barnes?

The Witness: The check was made to John Hendrickson personally, I signed—

The Court: Did John Hendrickson have any account at the bank? Let's not you and I fence.

On any statement of any bank account that you or any other companies you had at that bank, was there any charge of a hundred thousand dollars at that time?

The Witness: No, there was not.

The Court: And you know enough about banking practice to know that is where it would appear, if there was a loan of a hundred thousand dollars made at the bank?

The Witness: If the loan—

Q. By Mr. Burns: Just a minute, Mr. Hendrickson.

The Court: If he knows it. If he doesn't know—

Mr. Burns: You are asking about banking experience and practice.

The Court: Then he should say he doesn't know.

Mr. Burns: I might say, if I borrow from the bank I don't know how it would appear in the commercial account at the bank.

The Court: You don't?

Mr. Burns: I am not aware of how it would.

The Court: There is only way it should appear. It is charged to your account.

Mr. Burns: Pardon me, your Honor. I don't wish to fence with you, either. Could I be enlightened?

The Court: No, I withdraw the suggestion or the question and let's proceed.

Q. By Mr. Burns: Mr. Hendrickson—

The Court: So there can be no question about it, it wasn't when the loan was made there would be a charge, but when the loan was not paid on August 18, 1957, was the account charged with it?

Mr. Burns: I didn't understand—

The Court: That is the question.

The Witness: The question I answered is I didn't pay the loan on August 18th.

The Court: Did you ever pay it?

The Witness: Yes.

The Court: All right."

And counsel then asked only *1* question before the Court, for *approximately 4 pages,* of the transcript [R. T. 1574-1579], took over the examination, during which Mr. Burns was able to ask petitioner several questions.

B. Cross-examination. The first interruption by the Court occurred, after Mr. Bevan had asked a question but before it was answered, as follows [R. T. 1592]:

"Q. There has been certain testimony here that you received over four and one-half million dollars of Long Beach National Bank cashier's checks. Now do you recall having any conversation with Mr. Hewlett concerning the sum of a million dollars at any time?

The Court: If you had you would have remembered it?

The Witness: Yes, I said I don't recall."

Later, the Court interrupted counsel in the middle of a question and commenced a 3½ page [R. T. 1613-1616] cross-examination, which began as follows:

"Q. Before these notes were executed did Mr. Hewlett—

The Court: How was the interest to be payable?

The Witness: I can't truthfully say, your Honor. I just don't know.

Q. By Mr. Bevan: We don't want anything, of course, except the truth from you, Mr. Hendrickson. Now before you executed.—

The Court: Did you ever make any payment of interest on that note?

The Witness: I made no payment of interest on either one of the notes, your Honor.

The Court: This was a note, now, you executed when?

The Witness: Both notes were executed at the same time and that was in November of 1957.

The Court: '57, '58, '59 and then the unfortunate incident of Mr. Hewlett and we will stop there. Throughout that period you didn't make a single payment of interest on that note?

The Witness: No, sir, I did not."

Mr. Bevan resumed his cross-examination, with numerous interruptions by the Court, before the following interruption of Mr. Bevan occurred [R. T. 1640-1641]:

"Q. And now, Mr. Hendrickson,—

The Court: Now, you say you disagree. How much did Mr. Hewlett come up with or his estate, on the basis of what you sold him? How much did he come up with?

The Witness: Total amount?

The Court: Yes.

The Witness: Well, as is on the record, I stipulated to 3.7 million dollars.

The Court: That is what you came up with. You say Mr. Hewlett got things of value from you. What did he get?

The Witness: Perhaps I am confused in my understanding.

The Court: I withdraw the question. You proceed, Mr. Bevan.

The Witness: He got what I—

The Court: I withdraw the question You may proceed Mr. Bevan."

Thereafter the following interruption of Mr. Bevan occurred [R. T. 1643]:

"Q. Do you recall Mr. Kennedy testifying to that effect?

The Court: How much of your money was lost in Basin Uranium.

The Witness: I through investors—

The Court: Not through, your individual money?

The Witness: My own personal money?

The Court: Yes.

The Witness: I just can't answer that at this time.

The Court: It is because it is zero?

The Witness: No.

The Court: Or approximately zero?

The Witness: No."

And immediately thereafter the Court again interrupted Mr. Bevan to conduct an examination for some 2 pages of the transcript. [R. T. 1644-1646.] Thereafter,

preceded by several more interruptions, the Court took over the cross-examination for about 2½ pages of the transcript. [R. T. 1661-1663.] Later, the court resumed its cross-examination again for 2 pages [R. T. 1672-1675], followed by over a *half-dozen* more interruptions of Mr. Bevan's examination, the last of which brought appellant's first day on the stand to an end, as follows [R. T. 1691-1692]:

"Q. Or is it difficult for you to remember the situation?

The Court: Now, now, now. Finish it now.

The Witness: For example,—

The Court: No 'for example'. Finish your answer. If you have finished—

The Witness: Many checks made payable to Barnes Heating Equipment Company were reimbursement for monies that had been expended out of Barnes for the various oil ventures.

The Court: Now, you said 'Many'?

The Witness: Yes.

The Court: How much?

The Witness: I am in no position to tell you exactly at this time, your Honor.

The Court: Well, Mr. Bevan gave you a figure—

Mr. Bevan: $1,145,719.87 of cashier's checks to Long Beach National Bank, deposited to the account of the Barnes Heating Equipment Company.

The Court: Did the Barnes Heating Equipment Company expend one million, one-hundred forty-five thousand dollars, the amount set forth by Mr. Bevan in these oil ventures?

The Witness: Close to it, your Honor. At the time—

The Court: Well, how close to it?

The Witness: Within a hundred thousand of dollars.

The Court: Within a hundred thousand dollars."

The next day petitioner made a request to the Court as follows [R. T. 1697]:

"The Witness: Last Friday, due to a very confused and upset state of mind, I answered certain questions and gave incorrect answers that were not true, for which I sincerely apologize, both to the court and to the ladies and gentleman of the jury. And if your Honor will permit me at this time I would like to correct these answers."

Shortly thereafter following several interruptions of counsel's cross-examination by the Court, the Court took over the cross-examination for *1½* pages of the transcript [R. T. 1712-1714] during which the following comment to petitioner was made [R. T. 1713]:

"The Court: You have made a statement which would indicate that you take some exception to the questions put. Remember now, I don't know the facts. We are all here merely trying to get the facts. I gave you merely my recollection. I didn't suggest that you or anybody else had actually written out the note. The question is what was the note—whose note was it?"

Thereafter, interrupting Mr. Bevan, the following occurred [R. T. 1721]:

"Q. I note that on the—

The Court: Have you explored—how about the balance of the figures? You are going into that?

Mr. Bevan: I was going on to one further figure here, your Honor.

The Court: Go ahead."

And soon thereafter, the following occurred after an interruption [R. T. 1734] by the Court once again [R. T. 1735-1738]:

"The Court: Now what transpired over the week end that refreshes your recollection as to the terms of that instrument so particularly as to be able to tell us now that it referred to one matter and not the other.

The Witness: Last Friday, your Honor, I was in a very upset and very confused state, as I previously stated here, and I didn't realize the answer I was giving.

The Court: Do you realize all the answers you have given now?

The Witness: Yes. I do.

The Court: Now, Mr. Witness, Everybody wants to be completely fair to you and if any time comes that you think you would like to have a recess, don't hesitate to suggest it, because you are the fellow that is carrying the brunt of it. And when I say "you," I mean every witness carries the brunt of it. So that any time you want a rest or for whatever reason you want it, don't hesitate to suggest it and we will have one. This is too important a matter for you to be confused about.

Mr. Burns: Pardon me, your Honor. You mentioned that this witness had to carry a brunt. I believe that you should instruct the jury as to what the brunt is.

The Court: Members of the jury, this isn't anything personal with this witness, or any witness. You just put yourself on the stand here as a witness, and you have never had any such experience, Mr. Hendrickson never has been in court before, never testified before, you put yourself in that witness chair and in a strange habitat, surroundings, you have 12 jurors looking at you, you have a United States Attorney asking you questions, you have a judge who sometimes asks you questions, it is an unusual situation. The court did not intend to indicate anything special with respect to this defendant at all, and if you have got any such impression in your mind, strike it from your mind because the court did intend to do it.

This is the second time now when the court out of a desire to be unusually fair to a witness has used language apparently to which counsel felt there might be a double entendre, and the court doesn't intend to suggest that at all.

Mr. Burns: No, your Honor. It is just that the defendant does not carry the burden of proof.

The Court: Certainly not. They will be so told. But don't use the word "burden". He has no burden at all. He didn't have to take the stand. It is all voluntary on his part. And for his failure to take the stand, if he didn't take the stand, the jury wouldn't have the right to draw any unfavorable inference.

So it isn't because he is a defendant. A witness is a little bit disadvantaged because he isn't experienced here. Put him out on the oil field and he will make you and me look like fools. Put him on

a heating job and he will know just where to go and what to do, and I certainly won't know a thing about it. He is a witness. This is the first time he has been a witness.

So we understand Mr. Hendrickson, and we want to make sure that you are not confused and if at any time you feel any fuzziness that might be confusing, just say, would you repeat that question, or would you please give me an opportunity to think about it, or something like that.

The Witness: Yes, sir.

The Court: Are you satisfied, Mr. Burns?

Mr. Burns: Definitely.

The Court: Thank you."

Thereafter, the Court interrupted to conduct a cross-examination of almost 3½ pages of the transcript [R. T. 1745-1748] concluding as follows:

"The Court: Did they ever meet to approve or discuss any of these sales?

The Witness: I truthfully can't say. We have the corporation records here. I don't know.

The Court: Which corporation records would you like to have before you?

The Witness: Well, they wouldn't help me because I don't know—

The Court: Well, now, now, now. Which ones do you want to look at? You can read, can you?

The Witness: Yes.

The Court: Now, which corporation is it and the books will be made available to you and you can—we will have a recess to serve your purpose and you look through it and show us any reference at any meeting or board of directors to a proposed

sale of interests of the so-called Hewlett investors or any of them. You may have the books available and we will take a 15-minute recess for that purpose."

Then again for a period of about 8 pages of the transcript [R. T. 1754-1761] the Court and counsel alternately cross-examined appellant, the Court finally taking the examination over for 4 pages of the transcript [R. T. 1761-1765], and after several interruptions of counsel's examination, the following occurred [R. T. 1784-1785]:

"The Court: You did not have knowledge on friday that the records here would demonstrate that he didn't or did you not have knowledge on Friday that he did not have an account?

The Witness: I did not have knowledge that he did not have an account at that time on Friday. However, this morning based on records that we do have I know he didn't.

Mr. Burns: Pardon me, your Honor mentioned something about records that were here on Friday—

The Court: There was no suggestion of that.

Mr. Burns: I thought that was your first question.

The Court: There is no inference at all as to any records being here. The question and answer to me was a bit ambiguous and that was the purpose of my questioning, was to try to clarify it.

This witness said that now the records make him change his testimony. Is it that there were no records here on Friday or that on Friday he be-

lieved that his father did have an account, and that was all.

By Mr. Bevan:

Q. Now the check about which we were speaking drawn by Peter Hendrickson—

The Court: And your testimony now is that on Friday you did believe that your father had an account on the bank on which that check was drawn?

The Witness: You are right, your Honor."

Thereafter the Court took over cross-examination for 2½ pages of the transcript [R. T. 1793-1795], concluding as follows [R. T. 1795]:

"The Court: Not these particular items, but in any other bank—you said a little while ago, if my recollection serves me accurately—and here again, members of the jury, it is your recollection that controls, not the court's—that you had similar experiences with other banks where your checks would be returned charged to your account but that the check was returned to the bank unpaid and never was returned in fact to you by the bank, is that true or isn't it true? Or maybe this is a good time to take a recess and consider it."

Following the recess Mr. Bevan resumed his cross-examination and after intermittent interruptions, the Court finally took over the examination for 5 pages of the transcript [R. T. 1838-1844]; during which Mr. Bevan had an opportunity to ask several questions. This concluded appellant's second day of testimony.

Counsel resumed his cross-examination of petitioner the next day and preceded by several interruptions by the Court, the following occurred [R. T. 1867]:

"The Court: Didn't you tell us before it is your practice to leave a bunch of checks with Mr. Hewlett—

The Witness: I did not say that, your Honor. I said on occasions I had left signed checks with Mr. Hewlett.

The Court: On occasions you had left blank checks with Mr. Hewlett signed for him to fill in the date and amount, and that was to be done on the contingency you were not available, that you were out of town on the day, is that right?

The Witness: That would be correct, your Honor.

The Court: Well, now, looking at the other exhibits before you, the loan transaction of $700.00 on October 29th, cashier's check of October 29th to your order, which bears your signature, can you now tell us with any degree of certainty whether you were or were not out of town on that day?

The Witness: I would say, based on those facts, your Honor, I was in town on that day.

The Court: Well, under those circumstances, can you explain why you did not complete this other check for $1806.00, which bears a like date?

The Witness: I can't say that this is a fact, but on many occasions—

The Court: We don't want many occasions—

The Witness: It is a fact on many occasions, your Honor. I can't say it is in this particular case.

The Court: Just answer the particular question, if you can. If you can't—

The Witness: I cannot, your Honor.

The Court: All right."

Immediately thereafter the Court resumed its cross-examination, continuing for some 4½ pages of the transcript. [R. T. 1869-1874.]

Later, following several more intermittent interruptions, the Court *cross-examined* petitioner for 2½ pages of the transcript [R. T. 1888-1890], it being concluded as follows [R. T. 1889-1890]:

"The Court: You do recall delivering this check to Mr. Hewlett?

The Witness: I do not.

The Court: Well, can you explain then how it was found in Mr. Hewlett's possession?

The Witness: That I cannot tell.

The Court: After his death.

The Witness: I can't do that, your Honor. I don't know.

The Court: Do you have any suspicion that he committed any burglary in your office?

The Witness: I don't think so, your Honor.

The Court: When you have been volunteering a lot of possibilities as to other matters what do you think is the possibility here?

Mr. Burns: I am going to object, if your Honor please, on behalf of the defendant.

The Court: Objection sustained. The question is withdrawn."

At the conclusion of another cross-examination of petitioner for *2* pages of the transcript [R. T. 1917-1919], the following occurred [R. T. 1919]:

> "The Court: Did it ever occur to you, when you examined your accounts, to say, 'By God, I have got $11,250.00 more in my account than I should have?'
>
> The Witness: Well, the corporation accounts, I didn't keep those records, your Honor.
>
> The Court: And you were just totally ignorant of them.
>
> The Witness: I wouldn't say I was totally ignorant, no."

And after a series of interruptions by the Court, the following occurred, indicating once again the effect on petitioner of this continuous and persistent participation of the Court [R. T. 1931-1932]:

> "The Court: You said that you assumed you paid for the cashier's checks. You mean you would pay for them by a check drawn on the Farmers & Merchants Bank?
>
> By Mr. Bevan:
>
> Q. Or drawn on some other bank?
>
> The Witness: Your Honor, I am getting very confused. Would you repeat the question, please.
>
> Mr. Burns: Might I suggest in fairness to the defendant that he not be asked two questions simultaneously, one by Mr. Bevan and one by your Honor.
>
> Mr. Bevan: I apologize.
>
> The Court: Then I withdraw my question."

It should be here noted that in excess of *40* times during the cross-examination of petitioner the Court interrupted counsel as he was directing a question to or immediately after he had directed a question to appellant, and before appellant answered the question, as in the above example. It is no wonder that appellant was confused.

Shortly thereafter the Court took over the examination once again [R. T. 1939], the following occurred at its conclusion [R. T. 1940]:

> "The Court: But whatever your conversation was that practice continued, didn't it?
>
> The Witness: Yes.
>
> The Court: And did it continue accidentally?
>
> The Witness: I would say no, your Honor.
>
> The Court: You both knew it?
>
> The Witness: Not—I don't know if Mr. Hewlett knew, I only know what I knew.
>
> The Court: Well, when Mr. Hewlett held your check and put it in a paint box in his garage he knew that that check wasn't paid, didn't he?
>
> Mr. Burns: I am going to object, if your Honor please, as to what Mr. Hewlett's knowledge was. It is not binding on the defendant.
>
> The Court: Objection sustained.
>
> Do you think it is reasonable to infer from that that he knew?
>
> The Witness: I don't quite understand your question.
>
> The Court: Question withdrawn."

That afternoon after counsel resumed his examination the Court interrupted to conduct an examination

for *2* pages of the transcript [R. T. 1956-1958], which immediately preceded the following which commenced by interrupting Mr. Bevan in the middle of a question [R. T. 1960-1962]:

"Q. Knowing all that, Mr. Hendrickson—

The Court: Mr. Hendrickson, why do you volunteer that information? Why do you volunteer that information? You volunteered that information several times.

The Witness: I am sorry.

Mr. Burns: Pardon me, Your Honor, I don't know whether the witness understands what you mean by 'that information.'

The Court: Do you know what the question is? Mr. Hendrickson, it is important that you don't make answer to any question unless you fully understand it.

The Witness: Yes, your Honor.

The Court: And if you don't fully understand the question, why just say, I don't understand the question, would you please repeat it, or would you please explain it.

The Witness: Yes, your Honor.

The Court: All right. Now do you understand the question that the court put to you?

The Witness: Would the court please repeat it?

The Court: Why do you find it necessary to volunteer this information with respect to this check?

The Witness: I don't find it necessary. I was just trying to answer the question.

The Court: Did the question call for any in-

formation as to whether Mr. Burns had turned it over?

The Witness: No, it did not.

The Court: So you did volunteer that information?

The Witness: Yes, your Honor.

The Court: And you did remember then that Mr. Burns turned over some checks?

The Witness: I gave Mr. Burns the checks to turn over.

The Court: Do you know all the checks you gave Mr. Burns to turn over?

The Witness: No, I do not.

The Court: But you know that this is one?

The Witness: That is correct.

The Court: Your memory is very good as to this, is it?

The Witness: Yes.

The Court: Now the statement as to the other instance where you volunteered that Mr. Burns had turned something over, that wasn't responsive to the question that was pending before you, was it?

Mr. Burns: Pardon me, your Honor. I think in reference to one of the original questions of Mr. Bevan you asked the witness as to whether he had seen the check or not, and there apparently is some notation on the check that indicates that I had turned them over to Mr. Bevan.

Mr. Bevan: And I mistakenly said, your Honor, that there was a stipulation that the check was found in Mr. Hewlett's residence, and the witness did correct me in that respect, and to that extent it was responsive in assisting the court and jury.

The Court: Yes."

And soon afterwards, the Court interrupted another question by Mr. Bevan and the following occurred [R. T. 1965-1966]:

"Q. Now, Mr. Hendrickson, this check—

The Court: That is obvious to anybody, isn't it?

The Witness: Well, it is all I can truthfully say it was, your Honor.

The Court: But it is your check?

The Witness: Yes, it is.

The Court: And you can't truthfully tell us anything about the circumstances under which that check was issued or delivered?

The Witness: At this time, I cannot.

The Court: What is the date of that check?

The Witness: August 1958.

The Court: What is the amount of it?

The Witness: $20,000.

The Court: And you just have no recollection whatever on the subject?

The Witness: No, I don't."

And a short time later a [illegible]ge cross-examination by the Court [R. T. 1977-19[illegible]] concluded as follows [R. T. 1978-1979]:

"The Court: Why are you trying to throw us off the track when we ask you about who knows, and you tell us about the preparation? We are not concerned with the preparation of any assignments.

The Witness: I am not—

The Court: We are concerned with financial records.

The Witness: I am not—

The Court: Do you understand that?

Mr. Burns: Your Honor, on behalf of the defendant, can I ask you to strike from your last question, if it is a question, 'Why are you trying to throw us off the tract'?

The Court: Strike that out. Strike that out. Members of the jury, anything that is stricken from the record should be completely disregarded by you.

When Mr. Bevan asked you about records, did you think he was talking about assignments or about financial records?

The Witness: Which question was it? I believe he was talking about financial records.

The Court: Now, whom did you disclose—to whom did you disclose any of your financial transactions with Hewlett?"

This, was succeeded by another interruption of a question by Mr. Bevan following which the Court examined the petitioner for *2* pages of the transcript. [R. T. 1989-1985.] Shortly afterward, the Court conducted another *2* page examination [R. T. 1991-1992], which preceded another interruption and cross-examination of petitioner by the Court for *3* pages of the transcript [R. T. 1998-2001]; there being *3* more interruptions by the Court [R. T. 2001, 2004, 2007] before the third day of petitioner's examination concluded.

Shortly after counsel commenced cross-examination on the final morning of the trial, the Court took over the examination for *4* pages of cross-examination [R. T. 2019-2023] during which Mr. Bevan was able to ask *3* questions; *4* more interruptions [R. T. 2024, 2027,

2028, 2031] by the Court, each comprising about *1* page of cross-examination, preceded another interruption [R. T. 2032-2034] to cross-examine petitioner, the examination commencing as follows [R. T. 2032]:

"Q. There has been testimony here and a stipulation, sir—

The Court: May I make sure?

You said it is not true. Is it not true that that occurred or is it that you know it?

The Witness: All of the checks that were paid—

The Court: No. Could you answer my question. I want to clear it up in my own mind.

The Witness: Would you restate the question or give it to me again.

The Court: Read Mr. Bevan's question.

(The question referred to was read by the reporter. . . .)"

Almost immediately thereafter the Court again took over the examination to cross-examine petitioner for *4* pages of the transcript [R. T. 2037-2040]; which was followed by some half-dozen more intermittent interruptions by the Court to cross-examine petitioner, these examinations ranging from several questions to *1½* pages of the transcript; after which followed a *5* page examination by the Court [R. T. 2068-2074] during which Mr. Bevan was able to ask *3* questions. Mr. Bevan then resumed his examination, during which some *half-dozen* more interruptions by the Court occurred, before the examination of appellant was finally concluded.

Reasons for Granting the Writ.

I.

The Court below, apparently decided, erroneously, that petitioner urged that he was deprived of a fair and impartial trial *merely* because of the *amount* or *quantity* of the trial court's participation in the examination of witnesses. At the outset it must be declared that this was *not* petitioner's sole contention.

Petitioner did not complain merely that the trial court, for example, propounded almost 50% of the questions put to petitioner on direct examination when he took the stand in his own behalf, but that, in addition, the Judge interrupted his counsel's examination over *45* times to cross-examine him and break down his testimony, disrupting the orderly presentation of his case to the jury and virtually depriving him of the only opportunity he had so to do.

Similarly, petitioner did not complain merely that the trial Judge asked, on the average, one-third of the questions addressed to the other witnesses during the trial, but that in addition, the Judge persistently interrupted the examination of the witnesses by both counsel to engage in the practice previously described, and by the manner of questioning the witnesses, impliedly communicated to the jury his own belief as to their credibility without *contemporaneously* warning or instructing the jury that they must reach their own independent conclusion as to the credibility of the witnesses.

The extent to which a trial judge should participate in the examination has been expounded in various decisions of the federal courts of appeals. The following expressions of applicable principles were called to

the attention of the Court below in support of petitioner's contention that the trial court's conduct in the instant case was so improper and prejudicial as to deprive petitioner of a fair and impartial trial.

Judge L. Hand in *United States v. Marzano*, 149 F. 2d 923, at p. 926, enunciated the principle that a judge must refrain from "exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. *Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.*" (Emphasis added.)

In the leading case of *Adler v. United States*, 182 Fed. 464 at p. 472, it was stated:

> "But the conduct of the judge, in the performance of all his duties, should appear to be impartial. The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential role of the special importance in criminal cases. The importance and power of his office, and the theory and role requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of the opinion that the judge is permitted to take part impartially in the examination or cross-examination of witnesses, we can readily

see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the Government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury until his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption, they may also disregard it."

In *Williams v. United States,* 93 F. 2d 685, the Ninth Circuit Court defined its position as to the manner and extent of the participation of a trial judge, at page 691, as follows:

"The extent to which a trial judge should examine witnesses was well expounded by the Supreme Court of California in *People v. Boggess,* 194 Cal. 212, 241, 228 P. 448, 460; 'There can be no doubt that it is the duty of the trial court if the exigencies of the occasion require it, to facilitate, by one or more proper interrogatories, the direct and cross-examination of a witness. But for the court to repeatedly take the defendant as a witness out of the hands of his counsel, who as the record before us shows, was apparently competent, conscientious and expeditious in his conduct of the case, and proceed along an independent and extensive line of examination and cross-examina-

tion, is not only not commendable, but highly irregular, and for the sake of due and orderly administration of justice should not be indulged in. Ordinarily the proper course, and the one generally pursued, is to allow the examination by counsel —direct, re-direct, and recross—to conclude, and then if anything in the judgment of the trial court remains obscure, which may be material for the jury to know, and it seems desirable that an examination of the witness should be further pressed, then with perfect propriety the trial court may, and indeed should, intervene, so that the ends of justice may be subserved. This however should be done with care, particularly where the witness is a defendant in the case, lest the jury should, because of the court's intervention, and because of that fact alone, indulge in adverse inferences and conclusions from the testimony of the witness."

And in the recent case of *In re United States*, 286 F. 2d 556 (1961), at page 561, the Court facing a situation similar to that found in the instant case stated:

"This record provides the prime example of the consequences of overzealous participation in the examination of witnesses by the trial judge, for it is clear that the judge's sharp, persistent, sometimes almost badgering, questioning and caustic remarks first made the witnesses wary and overcautious and then confused them into inconsistencies and in addition disrupted the orderly presentation of the Government's case according to the plan outlines to jury by the Assistant U. S. Attorney by taking its witnesses into matters they were not offered to cover in their testimony.

Running cross-examination from the bench, particularly during a witness' direct examination, is an innovation in trial practice which definitely does not have the approval of this Court." (Emphasis added.)

Nevertheless, the Court below evidently decided that the sole ground advanced by petitioner was insufficient to overturn his conviction because no decision was found where reversal was obtained on this sole ground unaccompanied by other error. However, no decision has been found holding that reversal of a judgment would be denied because appellant urged this sole ground alone.

As the Court below disregarded the principles expressed in the decisions called to their attention there has been raised the extremely important question of the extent to which a federal Judge in a criminal trial may participate in the examination of witnesses during the course of trial, a question which has not been, but should be decided by this Court.

II.

The Court below apparently gave great weight to the fact that no formal objection was made during the petitioner's trial by counsel concerning the trial court's participation in the trial. At this time no explanation can be made for failure of counsel to object except to observe that counsel probably correctly surmised that an objection would be of no avail under the circumstances.

The Court suggests that by counsel's failure to object it indicated that he didn't believe that the Court's participation was prejudicial or detrimental to the petitioner.

Whether trial counsel so believed or not, it has been held by this Court that it is the duty of the Court to notice and correct errors where serious injury or prejudice would otherwise be suffered, even though the errors were not challenged during the trial.

Williams v. United States, 66 F. 2d 868, 869;
Benson v. United States, 112 F. 2d 422, 423;
Brasfield v. United States, 272 U. S. 448, 450;
United States v. Telkinson, 297 U. S. 157, 160.

If there was prejudicial error in the trial court's conduct, as the record unquestionably discloses, such an error cannot be waived by counsel and the implication in the decision of the Court below that such might be or was the case is clearly in conflict with the decisions rendered by this Court.

III.

The Court below indicated that the case in many of its aspects was complex, dealing with involved banking and financial matters and that it was the Judge's duty to see that the facts relative to these matters were clarified for the jury. However, from the inception of the trial the principal if not sole issue presented to the jury was whether petitioner had *knowledge* of George Hewlett's criminal conduct in diverting bank funds. Thus most of the respondent's witnesses were friends and business associates of petitioner and they were examined concerning their business and social relations with petitioner, and especially concerning conversations with petitioner regarding his business and financial activities. The information elicited from these witnesses was simple and uncomplicated.

The facts that George Hewlett misapplied and abstracted bank funds and that petitioner was the recipient of these funds was conceded at the commencement of trial. Some time was devoted by respondent to the manner in which Hewlett diverted bank funds and concealed this activity for many years, which did involve some complex matters, but this evidence played a minor and unimportant role in the presentation of respondent's case. It would be misleading to characterize the instant case as one, in its major material aspects, involving complexities.

The Court apparently referred to the complexities to indicate a possible situation requiring or justifying the trial court's participation. It is conceded that a trial judge not only has the right but the duty to intervene and participate in the examination of witnesses to clarify relevant facts and uncover the truth for the benefit of the jury *where this is not being accomplished by counsel.* If the judge does intervene he must do so impartially and in a proper manner. However, he cannot take the place of competent counsel nor, as the trial Judge did below, engage in the practice of interrupting counsels during their examination of witnesses and take over the examination from them. There is no question that counsel would not be permitted to interrupt each other's examination as did the trial Judge below.

Unfortunately, the Court below merely suggested but failed to explore or answer the important questions raised by the trial judge's conduct, to wit, the circumstances justifying or requiring the intervention and participation of the trial judge and the manner in which the judge should intervene if required to do so.

The decision of the Court seems to disregard the principles discussed in the cases heretofore cited concerning the circumstances requiring intervention and the manner in which the participation should be undertaken, an important question of federal law and procedure which has not been, but should be determined by this Court.

Conclusion.

Wherefore, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

ARTHUR D. COHEN and
HIRAM W. KWAN,

Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

John R. Hendrickson, Appellant, vs. United States of America, Appellee. No. 16,955. Sept. 13, 1961.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens and Barnes, Circuit Judges, and Murray, District Judge.

Per Curiam

Appellant appeals from a judgment of conviction on all counts of a 26 count indictment. Count I charged that appellant conspired with one George A. Hewlett to abstract and misapply moneys, funds and credits of the Long Beach National Bank, a member bank of the Federal Reserve Bank of San Francisco, whose deposits were insured by Federal Deposit Insurance Corporation, and that the object of the conspiracy was to supply appellant with moneys of said bank in excess of $3,500,000, without appellant paying consideration therefor, in violation of Title 18, U.S.C., Sections 371 and 656. Counts 2 to 26, inclusive, charged that on certain specified dates, George A. Hewlett wilfully abstracted and misapplied certain specified sums of money of said bank, and that appellant knowingly and wilfully aided, abetted, counseled and induced and procured the commission of such criminal acts by said Hewlett, in violation of Title 18, U.S.C., Sections 656 and 2.

The sole ground urged by appellant for a reversal of this case is that he was substantially prejudiced and deprived of a fair and impartial trial by the trial court unduly participating in the examination and cross-examination of all the witnesses in the case, including appellant, who testified in his own behalf. It is charged that the trial court indulged in said examination of the witnesses to such an extent that he interfered with the orderly process of the trial and the presentation of the case by both appellee and appellant and became an advocate for the prosecution.

At the outset, it is to be noted that no objection was made at any time during the trial to the amount of examination conducted by the court. That this failure to object was not due to counsel being over-awed by the court (as was suggested might have been the case in In re United States, 286 F. 2d 556, 561, cited by appellant) is demonstrated by the fact that counsel did on occasion object to specific questions asked by the Judge, and on other occasions differed sharply and forcefully with the Judge. Appellant's counsel on this appeal are not the same counsel who represented him at the trial. Not only did the trial counsel not object to the Judge intruding into the examination of witnesses, but on at least one occasion he invited the court to conduct the examination.

Counsel who took the lead in representing appellant at the trial is a competent, experienced, well-qualified lawyer. This observation is not to be construed as an intimation that appellant's counsel on appeal are any less competent or qualified, but is made to emphasize the fact that the trial counsel apparently saw nothing prejudicial or detrimental to appellant in the court's conduct of the trial.

The case in many of its aspects was complex, dealing with involved banking and financial transactions. The Judge not only had the right, but he also had the duty to see to it that all the facts relative to these complicated matters were brought out and made clear to the jury. Perhaps the extent of his participation in the examination of the witnesses leaves something to be desired as a model for the conduct of a trial, but a thorough examination of the entire record fails to convince this court that appellant suffered any bias or prejudice therefrom.

A review of the authorities cited by appellant would serve no useful purpose here. It must be pointed out, however, that no case has been cited or found where a judgment has been reversed solely because of the quantity of the Judge's participation in the examination of witnesses. Where undue participation of the Judge in the trial has been a factor in a reversal of a judgment, it has been the quality of the participation rather than the quantity which has led to the reversal and the court's conduct has been combined with other errors or the case has been a close one on the question of guilt or innocence of the defendant. In this case, no other errors is even suggested, and a reading of the entire record leaves one with an overwhelming impression of the appellant's guilt.

Affirmed.

(Endorsed) Per Curiam Opinion Filed Sept. 13, 1961.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment of Court Below.

United States Court of Appeals for the Ninth Circuit.

John R. Hendrickson, Appellant, vs. United States of America, Appellee. No. 16955.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 13, 1961.